

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

BERENIZ LARA-TELLO

Claimant

VS.

EXCEL CORPORATION

Respondent

Self-Insured

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Docket No. 1,004,546

ORDER

Claimant appeals the April 10, 2003 preliminary hearing Order of Administrative Law Judge Pamela J. Fuller denying medical treatment in the above matter. The Administrative Law Judge determined claimant's request for medical treatment should be denied on two bases. First, the Administrative Law Judge determined, both at the hearing and in the Order, that claimant had provided insufficient evidence to justify medical treatment at this time. Additionally, the Administrative Law Judge found claimant had not submitted timely written claim within 200 days, as is required by K.S.A. 44-520a.

ISSUES

The following issues were raised by claimant in her appeal:

- (1) The nature and extent.
- (2) Compensability.
- (3) Written claim.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for the purposes of preliminary hearing, the Appeals Board (Board) finds the Order of the Administrative Law Judge should be affirmed.

Claimant raises three issues to the Board for consideration. The first, the nature and extent of injury, is not an issue over which the Board will take jurisdiction on an appeal from a preliminary hearing.¹

The issues dealing with compensability and written claim are issues over which the Board takes jurisdiction. However, after reviewing the evidence, it appears the only compensability issue deals with whether claimant submitted timely written claim. Therefore, those issues will be determined as one.

Claimant suffered accidental injury while working for respondent, hanging livers. Claimant first noticed problems in October 2001, after working for respondent for not quite a year and a half.

Claimant reported to her supervisors and to the nurses' station personnel on October 25, 2001, that she was having problems in her shoulders. Claimant reported to the nurses' station on ten separate occasions, with the last one being November 12, 2001. At the time of the last examination, claimant advised that she was pain free and her shoulder problems resolved. Claimant continued working for respondent, although in a different capacity, through February 21, 2002, at which time she was terminated. There is no indication in the record as to the reason for the termination. Claimant acknowledged she sought no additional medical treatment through the end of her employment. She does, however, testify that her condition continued to get worse, although she did not report this to either her supervisors or to the nurses' station personnel.

Since leaving respondent, claimant has been unemployed, working at home, taking care of her two children and her house.

Claimant acknowledged that the activities involved in taking care of her house and her children caused her additional problems. Claimant testified that working at home, including sweeping and mopping, aggravated her shoulder conditions and that the pain experienced at home was higher than that which she experienced with respondent. The parties acknowledged claimant's written claim was submitted on June 13, 2002, in the form of an E-1. The Administrative Law Judge computed, and the Board agrees, that June 13, 2002 is 213 days after claimant's November 12, 2001 last visit with the personnel at the nurses' station at respondent's plant.

¹ K.S.A. 44-534a and K.S.A. 2001 Supp. 44-551.

The medical records from claimant's examinations were submitted to the company physician, J. Raymundo Villanueva, M.D. Dr. Villanueva opined that he was unable to make any connection between claimant's current symptoms and her work with respondent.

Claimant was referred by her attorney to Pedro A. Murati, M.D., board certified as an independent medical examiner and in physical medicine and rehabilitation, on December 3, 2002. At that time, Dr. Murati diagnosed claimant with bilateral shoulder pain, myofascial pain syndrome in the bilateral shoulder girdles and cervical spine, and bilateral carpal tunnel syndrome in claimant's hands and wrists. Dr. Murati further stated in his report that claimant's current diagnoses are all the direct results of claimant's work-related injuries with respondent.

In workers' compensation litigation, it is claimant's burden to prove her entitlement to benefits by a preponderance of the credible evidence.² K.S.A. 44-520a requires that written claim for compensation be served upon respondent within 200 days of the date of accident. In this instance, claimant's written claim did not occur until 213 days had passed. Based upon the evidence in this record, claimant's written claim was untimely.

Additionally, the Administrative Law Judge denied claimant benefits due to "insufficient evidence to justify medical treatment at this time."³ That issue would not be appealable to the Board from a preliminary hearing under K.S.A. 44-534a or K.S.A. 2001 Supp. 44-551. From this record, even if the Board were to reverse on written claim, the determination by the Administrative Law Judge to deny medical treatment would, nevertheless, still stand. Under K.S.A. 44-534a, the Administrative Law Judge has the responsibility to determine a need for medical treatment at preliminary hearing. The weighing of the evidence justifying medical treatment is left to the Administrative Law Judge, and the Board will not involve itself in a review of that determination at this stage.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Pamela J. Fuller dated April 10, 2003, should be, and is hereby, affirmed.

IT IS SO ORDERED.

² K.S.A. 44-501 and K.S.A. 2001 Supp. 44-508(g).

³ P.H. Trans. at 24.

Dated this ____ day of June 2003.

BOARD MEMBER

c: Kevin T. Stamper, Attorney for Claimant
D. Shane Bangerter, Attorney for Respondent
Pamela J. Fuller, Administrative Law Judge
Director, Division of Workers Compensation